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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of a three-judge United States District Court sitting in the District of South Carolina, which denied an injunction against the enforcement of a South Carolina legislative redistricting statute and dismissed appellants' complaint.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Charleston Division (Haynsworth and Russell, C.J.J., and Hemphill, D.J.), is not yet reported. A copy of the opinion is

appended hereto as Appendix A. The unreported opinion in the related case of *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), is appended hereto as Appendix B.

JURISDICTION

This suit was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of an act of the South Carolina legislature reapportioning the state Senate. Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. 1973c. The district court entered its judgment on March 12, 1976, and denied appellants' Motion to Alter or Amend Judgment on March 30, 1976 (Appendix C). Appellants filed their notice of appeal in the district court on April 16, 1976 (Appendix D).

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b). *See Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

STATUTES INVOLVED

Section 2 of Act 1205 of 1972, S.C. Code § 30-4.4 ("Act 1205"), is set forth in Appendix E hereto. Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set forth in Appendix F.

QUESTIONS PRESENTED

South Carolina has adopted a reapportionment plan for its state Senate that includes many multi-

member districts, with a requirement that candidates in each district run for numbered posts. If no candidate wins a majority of the vote in a Senate primary, there must be a runoff election. The Attorney General of the United States, acting pursuant to an order of the United States District Court for the District of Columbia, reviewed the South Carolina reapportionment law under Section 5 of the Voting Rights Act, and objected to it on the ground that it has a "clear and substantial" discriminatory effect. The appellants thereafter sued in the United States District Court for the District of South Carolina, in accordance with *Georgia* v. *United States*, 411 U.S. 526 (1973), seeking an injunction against the enforcement of the state law on the ground that South Carolina had not obtained preclearance either from the Attorney General or from the District Court for the District of Columbia. The South Carolina federal court refused the requested injunction, stating that it disagreed with the ruling of the District of Columbia federal courts pursuant to which the Attorney General reviewed the state law and made his objection. The questions presented in these circumstances are:

1. Whether the court below erred in declining to enjoin the enforcement of the South Carolina Senate reapportionment law where the Attorney General had objected to the law and the state had not obtained preclearance from the District Court for the District of Columbia.

2. Assuming *arguendo* that the court below was free to treat the Attorney General's objection as a nullity if it disagreed with the court ruling pursuant to which the objection was made, whether the court

below erred in disagreeing with the ruling of the District of Columbia Circuit that the Attorney General's initial failure to act was reviewable.

3. Assuming *arguendo* that the South Carolina Senate reapportionment is properly regarded as a "court-ordered plan" exempt from Section 5 preclearance procedures, whether the reapportionment is invalid because it includes multi-member districts disapproved by this Court for court-ordered plans.

STATEMENT

South Carolina's 1972 Senate reapportionment law contains discriminatory features that the Attorney General has found have a "clear and substantial racial effect." This case involves an attempt by black South Carolina voters to prevent the implementation of that discriminatory law on the ground that the state has not obtained preclearance of the plan as required by Section 5 of the Voting Rights Act ("Section 5").

For much of this century, South Carolina restricted black political participation by such devices as literacy tests and white primaries. When the Voting Rights Act was passed in 1965, only 37.3% of South Carolina's eligible non-whites were registered to vote.[1] At that time, the South Carolina Senate consisted entirely of single-member districts. In the seven years between the passage of the Voting Rights Act and 1972 the date of the last Senate election, non-white registration increased dramatically,

[1] U.S. Comm'n on Civil Rights, Political Participation 252-53 (1968).

to the point where 60.1% of South Carolina's eligible non-whites were registered.[2] The state House of Representatives, which was reapportioned in 1974 to include only single-member districts after the Attorney General objected to a multi-member plan, now contains 13 blacks out of 124 members. However, the South Carolina Senate was changed to multi-member districts, and a discriminatory multi-member plan will be perpetuated if the decision below is sustained. The South Carolina Senate today contains no black members, although over 25% of the state's registered voters in 1972 were black.[3]

When required by court order to review the South Carolina Senate reapportionment law under Section 5, the Attorney General found the law discriminatory and objected to it. The state chose not to adopt a new plan in response to the objection or to seek preclearance from the District Court for the District of Columbia, but announced that it would implement its law despite the requirements of Section 5. The court below has held that it may continue in that course. The facts underlying this abridgement of black voting rights are largely undisputed.

[2] Eligibility figures derived from data in U.S. Bureau of Census, 1970 Census—General Population Characteristics, PC(1)—B42 SC, Table 20: "Age by Race and Sex." Registration figures taken from South Carolina Election Commission, Report For the Period Ending June 30, 1973, at 574 (1974).

[3] South Carolina Election Commission, Report for the Period Ending June 30, 1973, at 574 (1974).

A. Act 932

In 1971 South Carolina enacted Act 932, which reapportioned the state Senate. That law created many multi-member districts having significant minority concentrations of black voters. It required candidates in those districts to run for numbered posts, and a runoff requirement prevented any candidate from winning a Senate primary election by less than a majority vote.

South Carolina submitted Act 932 to the Attorney General pursuant to Section 5, and he interposed an objection to the statute on March 6, 1972, on the ground that South Carolina had not met its burden of proving nondiscrimination. His letter of objection said that he was "unable to conclude, with respect to those plans, that the combination of multi-member districts, numbered posts, and a majority runoff requirement would not occasion an abridgment of minority voting rights in South Carolina."

Meanwhile, two suits had been filed in 1971 before a three-judge United States District Court for the District of South Carolina, attacking Act 932 under the one-man, one-vote rule; a third suit by black plaintiffs attacked the law under the Fifteenth Amendment and sought to enjoin its enforcement until it was precleared pursuant to Section 5. The Attorney General advised the district court of his Section 5 objection to Act 932 and asked the court to enjoin the enforcement of Act 932 on that ground without reaching the constitutional issues. The district court, however, proceeded to decide the constitutional issues on April 7, 1972. It held that the Act violated the Fourteenth Amendment by creating large population disparities among districts, but held that

the black plaintiffs had not carried the burden of proof on their Fifteenth Amendment claim. The court expressly declined to rule on the claims under Section 5, recognizing that it was without jurisdiction to do so:

> "[T]he District Court for the District of Columbia . . . is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff . . . under the Voting Rights Act, but shall confine our consideration to the claims of invalidity under the Fourteenth and Fifteenth Amendments . . . ." *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), Appendix B at 30a.

The court gave the South Carolina legislature thirty days to enact another apportionment plan, failing which the court would draw up a plan itself. Appendix B at 45a, 48a.

B. Act 1205

On May 5, 1972, the legislature enacted Act 1205 (the statute involved here), of which Section 2 reapportioned the state Senate. The new plan ameliorated the population disparities, but aggravated the multi-member-district flaw cited in the Attorney General's objection by creating larger multi-member districts. The state submitted the new act to the Attorney General under Section 5 and simultaneously transmitted a copy to the South Carolina district court, which *sua sponte* entered an order finding the Senate reapportionment in Act 1205 to be constitutional.[4]

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[4] *Twiggs* v. *West*, Order of May 23, 1972 (D.S.C., Civ. No. 71-1106), *aff'd mem. sub nom. Powell* v. *West*, 413 U.S. 901

By letter of June 30, 1972, the Attorney General declined to object to Section 2 of Act 1205, although it contains the same features to which he had objected in Act 932.[5] He explained that he would not exercise his own judgment under Section 5 but felt "constrained to defer to the . . . determination of the three-judge District Court" in *Twiggs* v. *West*, *supra*.

Black South Carolina voters then brought suit on August 10, 1972, in the United States District Court for the District of Columbia. They sought a ruling that the Attorney General was required to make an independent determination of the validity of the Senate reapportionment under Section 5 without "deferring" to the South Carolina district court.[6] The District Court for the District of Columbia held that the Attorney General's refusal to exercise his Section 5 responsibilities was reviewable for legal error under the Administrative Procedure Act, 5 U.S.C. § 702, and that the Attorney General had wrongly "abdicated" those responsibilities by purporting to defer to a court decision that had expressly declined to pass on the Section 5 question. The district court ordered

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(1973). (The appeal was on behalf of a political party and raised no racial discrimination or Section 5 questions.)

[5] The Attorney General did object to Section 3 of Act 1205, which provided for numbered seating in all multi-member districts of the state House of Representatives.

[6] On August 11, 1972, the District Court for the District of Columbia entered an interm order finding as a fact that the Attorney General's time for objecting to Act 1205 had not yet expired and extending his time to object pursuant to 5 U.S.C. § 705, in order to preserve the court's jurisdiction to rule on the complaint.

the Attorney General to make his own independent determination of the validity of Act 1205. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), *aff'd sub nom. Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975).

The Attorney General then reviewed Act 1205 under the standards of Section 5. He concluded that

> "Act 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act."

The Attorney General specifically found that the identical features that had caused him to object to Act 932 "are also present upon reviewing the existing Act in question (Act No. 1205)," and advised South Carolina of his objection to Act 1205 on July 20, 1973.

Although the Attorney General's independent judgment was that Act 1205 was discriminatory, he nonetheless appealed to the United States Court of Appeals for the District of Columbia Circuit, challenging the district court's ruling that had required him to make his independent review of Act 1205. The court of appeals affirmed the district court's ruling, *Harper* v. *Levi*, 520 F.2d 53 (D.C. Cir. 1975), and the Attorney General did not seek certiorari.

C. South Carolina's Actions

South Carolina submitted Act 1205, like its predecessor, to the Attorney General for preclearance under Section 5. By direction of the district court in *Harper*, the Attorney General formally notified South Carolina of the court's August 11, 1972 order that

tolled the Attorney General's time to object to Act 1205. *See* note 6 *supra*. At no time did South Carolina seek to become a party to the *Harper* litigation or seek relief from the tolling order. And at no time after the state was notified on July 20, 1973 of the Attorney General's objection to Act 1205, did the state seek preclearance by the alternate statutory route of a declaratory judgment action in the District Court for the District of Columbia. Indeed, the state Senate caucused and decided on November 5, 1975 simply to ignore the Attorney General's objection.

D. The Proceedings Below

On November 7, 1975, appellants filed this suit, seeking declaratory and injunctive relief against the enforcement of Act 1205 in the upcoming 1976 Senate elections. The United States appeared as *amicus curiae* and took the position that the district court should give effect to the Attorney General's objection to Act 1205. It conceded the error in the Attorney General's initial refusal to evaluate Act 1205, acknowledging the correctness of the *Harper* ruling on that issue.[7] The United States also suggested that *Connor* v. *Waller*, 421 U.S. 656 (1975), and *Chapman* v. *Meier*, 420 U.S. 1 (1975), counseled imposition of a single-member plan should it become

[7] Amicus Memorandum of the United States, filed Jan. 28, 1976. The United States noted that, under *Connor* v. *Waller*, 421 U.S. 656 (1975), the Attorney General and the District Court for the District of Columbia have exclusive jurisdiction over laws covered by Section 5, and other district courts are precluded from ruling on constitutional challenges based on racial discrimination until preclearance has been obtained.

necessary for the district court to fashion an interim plan for the 1976 Senate elections.[8]

After a hearing, the three-judge district court denied the requested relief and dismissed the complaint on March 12, 1976. The court held that it need not follow the District of Columbia Circuit's decision in *Harper* v. *Levi*, because the state had not been a party to the prior suit. It further held that the District of Columbia courts had erred in holding that the Attorney General's initial refusal to make his own determination of the validity of Act 1205 was reviewable. Although it did not dispute the *Harper* district court's authority to toll the deadline for the Attorney General's action, the court below stated that the Attorney General's objection made in response to *Harper* had no effect and that South Carolina is free to enforce Act 1205.

On March 22, 1976, appellants moved to alter or amend the judgment, apprising the district court of the possible bearing of this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 44 U.S.L.W. 4320 (U.S. Mar. 8, 1976), in order to insure a complete disposition of all issues pertaining to Act 1205 in this proceeding. Appellants simultaneously requested an injunction pending appeal. The district court on March 31, 1976 denied these motions without opinion.

This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

Act 1205 is plainly discriminatory. The Attorney General found its use of multi-member districts,

[8] *Id.*

numbered posts, and a majority runoff to have a "clear and substantial" discriminatory effect, and objected to it on that ground. Successive Attorneys General have consistently taken this position in objecting to an earlier South Carolina Senate plan, a South Carolina House of Representatives plan, and the reapportionments of both houses of the legislatures of Georgia, Mississippi, and Louisiana. This Court has upheld the Attorney General's view, stating that it is "beyond doubt" that such provisions "have the potential for diluting the value of the Negro vote." *Georgia* v. *United States*, 411 U.S. 526, 534 (1973).[9] Yet, after more than four years of litigation, South Carolina is continuing to give effect to its discriminatory Senate plan.

All parties have agreed from the outset that Act 1205 is subject to the preclearance requirement of Section 5. As the court below said:

> "It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation." Appendix A at 2a.

South Carolina submitted Act 1205, like its predecessor, to the Attorney General for Section 5 review. Like its predecessor, Act 1205 was objected to. Yet the ruling below, if sustained, would permit South Carolina to perpetuate its discriminatory Senate

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[9] *See also Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Amos* v. *Sims*, 409 U.S. 942, *aff'g* 336 F. Supp. 924 (M.D. Ala. 1972); *Petersburg* v. *United States*, 410 U.S. 962 (1973), *aff'g* 354 F. Supp. 1021 (D.D.C. 1972).

scheme without Section 5 preclearance. That ruling is infirm for at least three reasons.

1. The decision below is inconsistent with Section 5, whether or not *Harper* was rightly decided. The *Harper* decision, requiring the Attorney General to make his own evaluation of Act 1205, was simply the circumstance that led him to object to the state law. The critical fact is that he did object, after reaching the conclusion that Act 1205 is discriminatory. Regardless of the circumstances that led him to evaluate the law, his objection prevents Act 1205 from being effective until the state obtains preclearance by the alternative means prescribed in Section 5. Section 5 "essentially freezes the election laws of the covered States unless a declaratory judgment is obtained in the District Court for the District of Columbia . . . ." *Georgia* v. *United States*, 411 U.S. 526, 538 (1973). Where an objection is entered, the only role of the local federal courts is to enjoin implementation of the voting change pending preclearance. *Id.*; *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Holt* v. *Richmond*, 406 U.S. 903 (1972).

The court below thus had no authority to treat the Attorney General's objection as a nullity, but was required to honor it. South Carolina has deliberately eschewed filing suit in the District of Columbia to obtain preclearance of Act 1205. Under the terms of Section 5, Act 1205 has no effect until the state does so.

The court below suggested that the Attorney General's objection could be disregarded because it was made more than 60 days after Act 1205 was sub-

mitted to him. The court did not dispute that the district court in *Harper* had authority to enter the August 11, 1972 order extending the Attorney General's time to object;[10] but it seems to have thought that the extension was ineffective if the *Harper* courts were wrong in holding the Attorney General's action to be reviewable. In fact, the effectiveness of the extension did not depend on the correctness of the ultimate ruling in *Harper*. Regardless of any ultimate determination on the reviewability issue, the district court in *Harper* plainly had jurisdiction to determine that issue. Having such jurisdiction, it had the power to toll the Attorney General's time to object, in order to preserve its ability to grant relief if appropriate. "[T]he District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947); *see id.* at 289-95. The

[10] A statutory deadline for action by an administrative agency does not limit the agency's power to act pursuant to a court order arising out of a judicial review proceeding. *Harper* v. *Levi*, 520 F.2d at 64-66; *Bachowski* v. *Brennan*, 502 F.2d 79 (3d Cir. 1974), *aff'd in part sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973).

Moreover, although appellants believe the filing date of the review proceeding is not controlling, we note that the court in *Harper* found as a fact, contrary to the view of the court below (App. A at 3a), that the review proceeding was filed—and its jurisdiction therefore attached—during the Attorney General's 60-day allowed period from receipt of a completed submission, as measured in accordance with the tolling regulations. 28 C.F.R. §§ 51.3(b)-(d), 51.18; *see Georgia* v. *United States*, *supra*, 411 U.S. at 539-41.

Attorney General's objection, having been entered within the time period as extended, is effective to prevent the implementation of Act 1205 unless the state obtains preclearance from the District Court for the District of Columbia in the manner provided by Section 5.

Moreover, assuming *arguendo* that the effectiveness of the Attorney General's objection hinged on the correctness of the *Harper* decision, the court below erred in refusing to give effect to the final decree of another federal court. Since the issues were vigorously litigated in *Harper*, and appellees deliberately refused to take advantage of their opportunity to intervene, deference by the court below to the *Harper* decision was obviously the appropriate course.[11] At a minimum, *stare decisis* and concern for harmonious judicial administration should have led the court below to treat the ruling of the court of appeals of a sister circuit as "substantially binding." *Dawson* v. *Fernley & Eger*, 196 F. Supp. 816, 823 (E.D. Va. 1961).[12] It appears, however, that the

[11] *See Penn Central Merger Cases*, 389 U.S. 486, 505-06 (1968). "Those who are accorded an opportunity to be heard in a judicial proceeding established for determining the extent of their rights are properly bound by its outcome, either because they chose not to contest the State's claim or because they chose to do so and lost." *McKinney* v. *Alabama*, 44 U.S.L.W. 4330, 4332 (U.S. Mar. 23, 1976). *See also U.A.W.* v. *Scofield*, 382 U.S. 205, 212-13 (1965); *Nuesse* v. *Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Red River Broadcasting Co.* v. *FCC*, 98 F.2d 282 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938).

[12] "When one Circuit Court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demands that it should be followed by District

court below gave no weight to *Harper* on either legal or factual questions.

2. Even if the court below properly reached the *Harper* issues, its disposition of those issues is at odds with established law. The court below held that the Attorney General's initial refusal to perform his responsibilities under Section 5, which was based on an error of law, was immune from correction by the courts. That holding cannot be squared with the principle that final agency actions are reviewable under the Administrative Procedure Act ("APA"), except where review is statutorily precluded or "agency action is committed to agency discretion by law." 5 U.S.C. § 702. This Court has said that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967); *see Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). No such evidence exists in the case of Section 5.

First, nothing in Section 5 or its legislative history even hints that Congress intended to preclude judicial review of legal errors. Indeed, the legislative history points the other way.[13] Second, this Court's

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Courts until modified by the Appellate Court of the Circuit in which the District Court is located, or by the Supreme Court of the United States." *Gustafson* v. *Fred Wolferman*, 73 F. Supp. 186, 192 (W.D. Mo. 1947). *Accord, e.g., Spicknall's Estate* v. *C.I.R.*, 285 F.2d 561, 567 (8th Cir. 1960); *Homan* v. *United States*, 279 F.2d 767, 773 (8th Cir.), *cert. denied*, 364 U.S. 885 (1960).

[13] Congress was aware of the ruling in *Harper* v. *Levi* when it extended the Voting Rights Act in 1975, but it indicated no disapproval of the decision. Indeed, the decision was referred to in the Senate committee report and was praised

decisions and the Attorney General's regulations implementing Section 5 make clear that the Attorney General's responsibilities under that Section are quasi-judicial. He is to determine the validity under Section 5 standards of voting changes submitted by covered states, acting as a surrogate for a three-judge District Court for the District of Columbia. *See* 28 C.F.R. §§ 51.18-21; *Georgia* v. *United States*, 411 U.S. 526, 537 (1973). Under these circumstances, to hold that the statute precludes review is to reverse the presumption of reviewability established in *Abbott Laboratories*.[14]

The court below expressed its concern that the *Harper* ruling would expose every determination by the Attorney General under Section 5 to review in the courts. But the court ignored the limited nature of the *Harper* ruling. *Harper* held only that Section 5 requires the Attorney General to make an independent review of state laws submitted to him, and that he was legally wrong in believing that *Twiggs* precluded such a review of Act 1205. The *Harper* decree was in the nature of a mandamus under 28

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on the House floor by the floor manager of the extending legislation. *See* S. Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975); 121 Cong. Rec. H7631 (daily ed. July 28, 1975).

[14] The court below also suggested that judicial review was inappropriate because the Attorney General's refusal to exercise his Section 5 responsibilities did not foreclose the right of black voters to sue under the Fifteenth Amendment. Appendix A at 15a. That suggestion disregards the fact that Congress enacted Section 5 because of its conclusion that existing Fifteenth Amendment remedies were inadequate. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966); *Georgia* v. *United States*, 411 U.S. at 536-38.

U.S.C. § 1361—an order that the Attorney General perform his mandatory duty to evaluate Act 1205—and did not purport to dictate or even influence the conclusions he might reach. To the contrary, the courts in *Harper* recognized that it was for *the Attorney General* to evaluate Act 1205, and did not suggest that his determination on the merits was subject to judicial review. *Harper* thus opens no Pandora's box of judicial review, as the Attorney General himself implicitly recognized in not seeking certiorari in *Harper*.

The decision below stands in direct conflict with the final decree in *Harper*. An objection entered by the Attorney General pursuant to an order affirmed by the District of Columbia Circuit has been declared to have no effect by an inferior federal court in another circuit. Such a conflict would call for plenary review by this Court even on certiorari. Since this is a direct appeal, full consideration is obviously appropriate.

3. In their Motion to Alter or Amend Judgment, appellants directed the attention of the court below to this Court's recent decision in *East Carroll Parish School Board* v. *Marshall*, 44 U.S.L.W. 4320 (U.S. Mar. 8, 1976), and to the possibility that Act 1205 might be considered a "court-ordered plan" under that decision. For the reasons set forth in the margin,[15] appellants believe that Act 1205 is not a court-

[15] In *East Carroll Parish*, the Court held that a police jury's reapportionment of itself was a court-ordered plan and exempt from Section 5, where the police jury had no authority under state law to reapportion itself but acted solely under the authority of a federal court order. The Court said, "Had

ordered plan within the meaning of *East Carroll Parish*, but is subject to Section 5 as construed in *Connor* v. *Waller*, 421 U.S. 656 (1975). Every court that has considered the issue—as well as the parties and the United States—has agreed that Act 1205 requires preclearance under Section 5. If, however, Act 1205 is held to be controlled by *East Carroll Parish*, then the applicable principles are those governing a district court's exercise of its supervisory power over a reapportionment. *Chapman* v. *Meier*, 420 U.S. 1 (1975).

East Carroll Parish and *Chapman* hold that, "absent the most pressing circumstances," a court may

the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required." 44 U.S.L.W. at 4321 n.6. In this case, the South Carolina legislature had full authority under the state constitution to apportion itself, and has done so repeatedly. It adopted Act 1205 as the successor to Act 932, which it submitted for preclearance and to which the Attorney General objected. Moreover, the court order of April 7, 1972 invalidating Act 932 under the Fourteenth Amendment was itself premature under *Connor* v. *Waller*, which establishes that the court should have—as the United States recommended—deferred to the exclusive jurisdiction of the Attorney General and the District Court for the District of Columbia by simply enjoining Act 932 for lack of Section 5 clearance. *See* S. Rep. No. 94-295, 94th Cong., 1st Sess. 18 (1975). Finally, the litigation testing Act 932, which resulted in the April 7 order, began with a suit filed by the South Carolina Attorney General at the direction of the state legislature. Concurrent Resolution S. 671, General Assembly of 1971, adopted by the South Carolina Senate on November 4, 1971 (Senate Journal of 1971, 2505), and by the South Carolina House of Representatives on November 9, 1971 (3 House Journals of 1971, 3717).

not order a multi-member reapportionment plan. In this case, there has been no finding of pressing circumstances; nor could there be, in view of the Attorney General's finding of "clear and substantial" discriminatory effect. Act 1205, with its multi-member districts, is fatally defective under any view of the case, and the court below was wrong in refusing to enjoin its implementation.[16]

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

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April 28, 1976

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[16] If Act 1205 were held to be a court-ordered plan, single-member districts would be required notwithstanding that the plan was originally implemented four years ago. *Whitcomb* v. *Chavis*, 403 U.S. 124, 162-63 (1971).

APPENDICES

APPENDIX A

Opinion Below

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
THREE-JUDGE COURT

No. CA/75-1998

FRANCES MORRIS AND MAXINE WOODS,
Plaintiffs,

—versus—

L. MARION GRESSETTE, President Pro Tem of the South Carolina Senate; JAMES B. EDWARDS, Governor of South Carolina, DANIEL R. MCLEOD, Attorney General of South Carolina; BRANTLEY HARVEY, JR., Lieutenant Governor of South Carolina; LOVICK C. THOMAS, Clerk of the South Carolina Senate; O. FRANK THORNTON, Secretary of State of South Carolina; JAMES ELLISOR, Executive Director of the South Carolina State Election Commission; G. P. CALLISON, Chairman, South Carolina State Election Commission; MARGARET TOWNSEND, MARTHA CHAPMAN, EDGAR L. MORRIS, and RUBEN GRAY, Members, South Carolina State Election Commission,

Defendants.

Heard: January 28, 1976. Decided: March 12, 1976

Before HAYNSWORTH, Chief Circuit Judge, RUSSELL, Circuit Judge, and HEMPHILL, District Judge.

RUSSELL, Circuit Judge:

The plaintiffs seek by this action to enjoin the enforcement of the South Carolina State Senate Reapportionment Act of 1972 (described as Act 1205 in the complaint)[1] on the ground that such Act has never been validated as required by § 5 of the Voting Rights Act of 1965, § 1973c, 42 U.S.C.[2] The background of the legislation under review and the litigation surrounding it is fully set forth in *Harper* v. *Levi* (D.C.Cir. 1975) 520 F. 2d 53. It is unnecessary to repeat it in any detail since the issues involved here are fairly narrow and the factual basis for them largely uncontroverted.

It is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with § 5 of that Act was a condition to the enforcement of such legislation. Compliance, giving the State either interim or permanent clearance for enforcement of the legislation, however, could have been effected by

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[1] Senate Reapportionment Statute, Act 1205 of 1972.

[2] Plaintiffs rely for authority to maintain the action, it would seem, on *Allen* v. *State Board of Elections* (1969) 393 U.S. 544, 561:

> "* * * [A]n individual may bring a suit for declaratory judgment and injunctive relief, claiming that a state requirement is covered by § 5, but has not been subjected to the required federal scrutiny."

the State under § 5 in two ways. It could have filed an action for a declaratory judgment in the District Court for the District of Columbia or it could, through the State Attorney General, have submitted the legislation to the Attorney General of the United States for such clearance. If, in the declaratory judgment action, the legislation had been found not to offend the Voting Rights Act, or, if the Attorney General of the United States, within sixty days after submission to him, failed to interpose an objection to the legislation, the State could enforce the revised election procedure, unless and until there has been a successful proceeding to invalidate the state law on constitutional grounds.

In this case, the State chose, in line with the practice generally adopted by complying States under the Act, to follow the procedure of submitting the reapportionment legislation to the Attorney General of the United States.[3] It is conceded the Attorney General did not interpose an objection to the legislation within sixty days after it was properly submitted to him. Actually, he advised the State formally within the sixty day period that he interposed no objection to the enforcement of the legislation. The plaintiffs herein, however, filed, about thirty days after the expiration of the sixty day period allowed the Attorney General to interpose objection, "a class action in the District Court [of the District of Columbia] seeking review, pursuant to Section 10 of the Administrative Procedure Act, or [the]

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[3] *See*, Note, *Discriminatory Purpose, Charges and Dilution: Recent Judicial Interpretations of § 5 of the Voting Rights Act*, 51 *Notre Dame Lawyer* 333 at 334, n. 11.

decision of the then Attorney General to forego objection under Section 5 of [the] proposed reapportionment of the South Carolina Senate."[4] The District Court held in that case that the action of the Attorney General was reviewable under the Administrative Procedure Act[5] and, on review, concluded "that the Attorney General had not fulfilled his statutory obligation and ordered him to reconsider without regard to the prior court decision."[6] On appeal, the jurisdiction to review was upheld and the finding that the prior failure to interpose an objection by the Attorney General was ineffectual to make the enforcement of the Act effective was sustained.[7]

At this point, the plaintiffs, armed with the decision in *Harper*, returned to this Court. They contended that, on principles of collateral estoppel, *Harper* is conclusive on the issues of (1) the reviewability under the Administrative Procedure Act of

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[4] It is of interest that the same judge who decided *Harper* later in another case where a private party sought judicial review of the Attorney General's determination under § 5 dismissed, *sua sponte* the petition for review, stating that "a request for review of the Attorney General's findings may be made *only* by the State or political subdivision covered by the Act." (Italics Court's) *Griffith* v. *United States* (May 3, 1974) Cir. #74-648, D.C. of District of Columbia. This same conclusion was approved in *United Jewish Org. of Williamsburgh* v. *Wilson* (2d Cir. 1975) 510 F.2d 512, 520, n. 15. Under this construction of the statute the action in *Harper* should have been dismissed at the outset.

[5] § 701, *et seq.*, 5 U.S.C.

[6] *See, Harper* v. *Levi* (D.C. Cir. 1975) 520 F.2d 53, 54-5.

[7] 520 F.2d at 58.

the Attorney General's initial decision not to interpose an objection, (2) the invalidity of that initial action of the Attorney General, and (3) the effectiveness of the objection to the legislation, entered by the Attorney General, in obedience to the decision of the District Court in that case some year and a half after the submission to the Attorney General under the Act, as an absolute bar to enforceability of the state legislation, absent successful prosecution of a suit for a declaratory judgment of the constitutional validity of such legislation. Under this argument, if sustained, we would be limited in the action we could take to enjoining the enforcement of the Act itself for failure to comply with the requirements of § 5 and to ordering the State to submit in a reasonable time an acceptable substitute reapportionment plan or, in default of such submission, to promulgating an interim plan of reapportionment of our own. The defendants assert, on the other hand, that collateral estoppel is not applicable and that this Court is free to exercise its own independent judgment on the question whether the failure of the Attorney General to interpose within sixty days an objection automatically authorized the State to enforce the Act.

It is obvious from this statement of positions that the first problem to be addressed is whether the defendants are precluded by collateral estoppel from asserting, contrary to the conclusions reached in *Harper* v. *Levi*, that the conditions of § 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Act. We conclude they are not so precluded. Our reasons for this conclusion follow.

There is no dispute with the proposition that, contrary to the earlier view based on a mechanical application of the principle of mutuality, the modern rule is that a valid judgment in a prior suit, involving the same issues may, by way of collateral estoppel, be asserted in a subsequent action by a stranger to the first suit against one who was a party or, in privity with a party, in that earlier action. And this is the rule of our Circuit, as stated in a number of decisions. *State of North Carolina* v. *Chas. Pfizer & Co., Inc.* (4th Cir. 1976), —— F. 2d ——; *Thomas* v. *Consolidation Coal Company* (1967) 380 F.2d 69, *cert. denied* 389 U.S. 1004, (1967), *reh. denied* 389 U.S. 1059 (1968); *Graves* v. *Associated Transport, Inc.* (4th Cir. 1965) 344 F.2d 894; and *see*, generally, 31 A.L.R. 3d 1044, *et seq.*[8] But this plea, it must be observed, is *only*

[8] There is some conflict in the decisions whether this claim of collateral estoppel by a stranger to the proceedings may be asserted offensively, as do the plaintiffs in this case, or is limited to defensive application. The Supreme Court noted the distinction between an offensive and defensive use of the plea in *Blonder-Tongue* v. *University Foundation* (1971) 402 U.S. 313, 330. It did not, however, decide whether the plea was limited in application to defensive assertion. Our Circuit similarly avoided resolving the issue for this Circuit in *North Carolina* v. *Chas. Pfizer & Co., supra.*

The leading case for use of collateral estoppel either offensively or defensively is *B. R. DeWitt, Inc.* v. *Hall* (1967) 19 N.Y. 2d 141, 225 N.E. 2d 195, 31 A.L.R. 3d 1035. The contrary view, limiting the plea to defensive use, is stated in Note, *The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 *Geo. Washington L. Rev.* 1010 (1967), in which the author states that "the judicial policies underlying collateral estoppel are generally subserved by allowing defensive assertion of the plea by a nonparty and

available against persons who were either parties to the prior judgment or, in privity with such parties.[9] The Supreme Court so declared recently in *Blonder-Tongue* v. *University Foundation, supra,* at 329:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. See *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *Bernhard*, 19 Cal. 2d, at 811, 122 P.2d at 894."

The courts have, it is true, developed some exceptions to this rule by broadening the definition of privies under the rule to include persons not expressly named as defendants but whose conduct and intimate participation in the action justify their being so classified. But, "in order for a person not

frustrated by allowing offensive assertion, even though allowing the plea has the obvious effect of shortening the subsequent litigation in either case." A full list of relevant law review articles on the issue is set forth in 31 A.L.R. 3d at 1050 and 1051.

[9] *City of Richmond* v. *United States* (1975) —— U.S. ——, slip op., p. 14, n. 6; *Gratiot State Bank* v. *Johnson* (1919) 249 U.S. 246, 248-9; *Thomas* v. *Consolidation Coal Co., supra,* at 85; *Humphreys* v. *Tann* (6th Cir. 1973) 487 F.2d 666, 670-1, *cert. denied* 416 U.S. 956 (1974); *Scooper Dooper, Inc.* v. *Kraftco Corp.* (3d Cir. 1974) 494 F.2d 840, 844; *Bruszewski* v. *United States* (3d Cir. 1950) 181 F.2d 419, 422, *cert. denied* 333 U.S. 828 (1948) and 340 U.S. 865 (1950).

formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense." *Hy-Lo Unit & Metal Products Co.* v. *Remote C. Mfg. Co.* (9th Cir. 1936) 83 F.2d 345, 350. And this is the rule as it has been applied consistently in this Circuit. Thus, in *E. I. Du Pont de Nemours & Co.* v. *Sylvania I. Corporation* (4th Cir. 1941) 122 F.2d 400, 405, it was held that "mere assistance in the defense of a case is insufficient to bind a person not joined as a party;" it is only "participation in the trial and control of the litigation," which will "bind the participant" who is not "a party to the record." The same rule was restated in the later case of *Thaxton* v. *Vaughan* (4th Cir. 1963) 321 F.2d 474, 479, wherein the Court stated that the "mere appearance as a witness, or the supplying of an attorney," [10] is insufficient to bind a non-party by the judgment; [11] and that it is only "where a nonparty, * * * effectively controls the action" that "he may be bound by the result." [12] Other courts used a

[10] To the same effect: *Rumford Chem. Wks.* v. *Hygienic Chem. Co.* (1909) 215 U.S. 156, 160; *Council Brothers, Inc.* v. *Ray Burner Company* (5th Cir. 1973) 473 F.2d 400.

[11] *See, also, Bryson* v. *Guarantee Reserve Life Insurance Company* (8th Cir. 1975) 520 F.2d 563, 567.

[12] *See,* for instance, *Ritchie* v. *Landau* (2d Cir. 1973) 475 F.2d 151, 155, n. 2 ("[o]ne who, though not a party of record, controls in furtherance of his own self interest the conduct of adjudicatory proceedings by or against another is bound by the result of the proceeding"); *Drier* v. *Tarpon Oil Company* (5th

somewhat different formula in phrasing the exception, declaring that where one though not a formal party to the litigation, "had the initiative in a recognizably substantial litigation," he may be bound under the doctrine of collateral estoppel by the judgment entered therein. *Poster Exchange, Inc.* v. *National Screen Serv. Corp.* (5th Cir. 1975) 517 F.2d 117, 123. And they have defined "initiative" in this sense as "choice of forum." [13] Assuredly, if the criteria as stated in these cases are applied here, the defendants cannot be considered as either parties or privy to parties to the judgment in *Harper* v. *Levi* or bound by the decision in that case. They did not choose the "forum"; they did not assist in the defense; they did not participate in the trial; they were not consulted by the defendants on defense strategy; they did not appear as a witness or supply an attorney; and they unquestionably did not control the litigation in *Harper.* They were accordingly not within the exceptions to the rule as stated in *Blonder-Tongue.*

The plaintiffs argue, though, that the present defendants could have intervened in *Harper* and that because they failed to intervene, the defendants are bound by the decision in that case, even though not named as parties defendant and even though they were not participants in any way in that case. This,

Cir. 1975) 522 F.2d 199, 200 ("[p]rivity can be found if one party 'controlled the earlier lawsuit and its interests were represented by' the party to the first suit.")

[13] *See James Talcott, Inc.* v. *Allahabad Bank, Ltd.* (5th Cir. 1971) 444 F.2d 451, 461-2, *cert. denied* 404 U.S. 940 (1971); *Brightheart* v. *McKay* (D.C. Ct. 1966) 420 F.2d 242, 245, n. 4.

it must be said, is an unusual and novel twist to the doctrine of collateral estoppel. Its broad applications, if adopted, could create shocking situations and disturb long-established principles. Under this claimed extension of the doctrine of collateral estoppel, a person, who knows of a suit wherever filed, involving an issue affecting him, and though it may be that he cannot be served with process in that suit and made amenable to the jurisdiction of the Court, he, if he fails to intervene, can be concluded by the judgment in that case. Such an argument, so contrary to fundamental concepts of due process, can be justified neither in reason nor on authority and, whenever asserted, it has been consistently repudiated both in authoritative federal and state decisions. *Chase National Bank* v. *Norwalk* (1934) 291 U.S. 431, 444; *Gratiot State Bank* v. *Johnson, supra,* at 249-50; *Western Union Tel. Co.* v. *Foster* (1918) 247 U.S. 105, 115; *Brown* v. *Wright* (4th Cir. 1943) 137 F.2d 484, 487; *Gonzales* v. *Cassidy* (5th Cir. 1973) 474 F.2d 67, 76; *McGhee* v. *United States* (Ct. Cl. 1971) 437 F.2d 995, 1000; *Hatridge* v. *Aetna Casualty & Surety Company* (8th Cir. 1969) 415 F.2d 809, 812; *King* v. *Kings County Lafayette Trust Company* (E.D. N.Y. 1970) 323 F. Supp. 640, 648; *Pollard* v. *Roberts* (E.D. Ark. 1968) 283 F. Supp. 248, 254, *aff'd.* 393 U.S. 14 (1968); *Stott* v. *United States* (S.D. N.Y. 1958) 166 F. Supp. 851, 854; *United States* v. *Cohen* (S.D. Fla. 1967) 271 F. Supp. 709, 720; *State* v. *Fidelity and Casualty Company of New York* (1966) 268 N.C. 234, 150 S.E. 2d 396, 401; *O'Hara* v. *Pittston Co.* (1947) 186 Va. 325, 42 S.E. 2d 269, 280, 174 A.L.R. 945; *Sweeting* v. *Campbell* (1954) 2 Ill. 2d 491, 119 N.E. 2d 237, 240; *Crockett* v. *Harrison* (1960) 26 Ill. App. 2d 9, 167 N.E. 2d

428, 431; *Bannard* v. *New York State Natural Gas Corporation* (1961) 404 Pa. 269, 172 A.2d 306, 312; *Mixon* v. *Barton Lumber and Brick Company* (1956), 226 Ark. 809, 295 S.W. 2d 325, 329; 46 Am. Juris. 2d 680 ("[t]he right to intervene in an action does not, in the absence of its exercise, subject one possessing it to the risk of being bound by the result of the litigation, under the doctrine of res judicata.")

The opinion of Justice Brandeis, speaking for an unanimous Court in *Chase National Bank*, it would seem, should long ago have laid this argument to rest. There, he said (291 U.S. at 441):

> "* * * The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. Whether under the Ohio practice it would have been possible for the trustee to intervene, we have no occasion to determine. Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

In *Gratiot State Bank*, the same Justice had expressed the rule thus (249 U.S. at 249):

> "* * * The Trustee contends, however, that since by §§ 18b and 59f of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the Bank should be considered a party thereto. * * * But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the litigation and, as such, unaffected by the decision of even essential subsidary issues."

And this was stated as the rule in this Circuit in *Brown, supra,* at p. 487, where Judge Parker put it:

> "* * * And the fact that he may have had the right to intervene in the state proceeding is immaterial, since he did not in fact intervene or in any way make himself a party thereto."

To paraphrase *King,*[14] it "seems incredible," that the plaintiffs would press the argument that failure to intervene provides a basis for collateral estoppel in the face of such an array of final federal and state authorities. They, however, posit that *Penn-Central Merger Cases* (1968) 389 U.S. 486, supports their contention. We do not so understand this decision.

Penn-Central was an unusual case involving an attempted railroad consolidation under the terms of Section 407 of the Transportation Act of 1920, as amended, § 5(2)(b), 49 U.S.C., where various objections to the plan of consolidation were made in different jurisdictions. The New York Court, where most of the objections were centered, ruled on certain objections to the plan and the Supreme Court merely held that when it had affirmed "the decision of the New York court," that decision of the Supreme Court itself on those issues necessarily "preclude[d] further judicial review or adjudication of the issues upon which it [the Supreme Court] pass[ed]."[15] But this conclusion does not, we suggest, rest on collateral estoppel; it is no more than

[14] *King* v. *Kings County Lafayette Trust Co., supra,* 323 F. Supp. at 648.

[15] 398 U.S. 505-6.

a statement of the well-recognized relationship of the Supreme Court to the inferior federal courts and the effect of the former's decisions on those of the latter. The decision of the Supreme Court on the issues decided in *Penn-Central* unquestionably obligated all lower federal courts to follow that decision and "precluded" them from reaching a contrary conclusion or adjudication on the issues resolved therein by the Supreme Court. *See, Hicks* v. *Miranda* (1975) 422 U.S. 332, 344-5. In other words, the Supreme Court was simply stating the obvious fact that inferior courts may not reverse the Supreme Court or its rulings. That is the holding in that case, as we view it. So construed, it accords with established principles and provides no warrant for assuming that failure to intervene may be translated into a collateral estoppel against one not a party to the litigation. Of course, had *Harper* v. *Levi* been affirmed on appeal by the Supreme Court, we would, as an inferior federal court, be obligated to follow it, just as the Supreme Court in *Penn Central* said that all lower federal courts, confronted with the same issues decided by the Supreme Court therein, were bound to follow *Penn-Central.* But *Harper* v. *Levi* was not appealed and the Supreme Court did not affirm it. We are accordingly not obliged to follow it but may exercise our own judgment.

We now pass to the substantive issue, which is determinative of the plaintiffs' claim in this action. That issue is the reviewability at the instance of the plaintiffs of the Attorney General's decision not to interpose an objection to the State Senate's reapportionment statute within sixty (60) days after its submission. The Court in *Harper* v. *Levi* held, and the plaintiffs contend, that such decision was

reviewable at the instance of the plaintiffs under the Administrative Procedure Act. We do not.

§ 5 is silent on the reviewability of the action of the Attorney General as provided thereunder. In that event, one "affected adversely" by the action will be entitled to judicial review thereof under the Administrative Procedure Act, if such action is adjudicatory and the one affected thereby has no "other adequate remedy in a court" [16] unless there is "persuasive reason to believe that [non-reviewability] was the purpose of Congress." [17] In our view the action of the Attorney General under § 5, however, is (1) not adjudicatory, and (2) any party with standing, who was dissatisfied with his action, had an "adequate remedy in a court," and (3) there were not simply "persuasive" but compelling reasons to believe non-reviewability of that action was "the purpose of Congress."

That the action of the Attorney General is not adjudicatory follows from the fact that it is neither a final nor a definitive finding of any kind on the validity of the legislation submitted.[18] It decides nothing on the merits which can bind anyone.[19] The

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[16] 5 U.S.C. 704.

[17] *Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 140.

[18] *See, Columbia System* v. *U. S.* (1942) 316 U.S. 407, 424:

> "We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights * * *."

[19] "The Attorney General [in making his determination] does not act as a court in approving or disapproving the state legislation." *Allen* v. *State Board of Elections, supra,* at 549.

determination of the Attorney General under § 5 has "no [more] binding legal consequence" than did the administrative action in *Ewing* v. *Mytinger & Casselberry* (1950) 339 U.S. 594, 600, *reh. denied* 340 U.S. 857 (1950), which, because it included "no binding legal consequence," and was not adjudicatory, was found not to be subject to judicial review.

Nor does the Attorney General's action operate to bar any party, whether it be the submitting State or political subdivision or a complaining private party, from maintaining in an appropriate proceeding its or his claim in reference to the validity of the submitted legislation. § 5 makes this especially clear with its proviso that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement * * *." The right of these plaintiffs to attack this State reapportionment act on constitutional grounds under the Fifteenth Amendment thus remained intact, unimpaired in the slightest by the Attorney General's determination, and expressly preserved by the specific language of § 5 itself. If the State which submits the legislation is dissatisfied with the Attorney General's determination, its "remedy in court," as declared in the section, is not judicial review of the Attorney General's determination but a declaratory judgment action in the District Court of the District of Columbia. In *Allen* v. *State Board of Elections, supra,* at 549-50, the Court made this abundantly clear:

> "If the Attorney General objects to the new enactment, the State may still enforce the legislation upon securing a declaratory judgment

in the District Court for the District of Columbia.

* * * *

"Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5."

It cannot then be said that the plaintiffs, if denied the right of judicial review, are without an "adequate remedy in court" for the vindication of their rights under the Fifteenth Amendment. This "other adequate remedy" is far more immediate and more available than that available to an employer in a certification proceeding under the National Labor Relations Act, which has been held not reviewable under the Administrative Procedure Act, *see N.L.R.B.* v. *Clement-Blythe Companies* (4th Cir. 1969) 415 F.2d 78, 81-2, and the procedure which the Court said in *South Carolina* v. *Katzenbach* (1966) 383 U.S. 301, at 333, might be "a partial substitute for direct judicial review."

In *Klein* v. *Commissioner of Patents of United States* (4th Cir. 1973) 474 F.2d 821, 824, we declared that § 704, 5 U.S.C. of the Administrative Procedure Act, established "two essential elements as a prerequisite to judicial review: (1) final agency action and (2) no other adequate remedy in a court." It is plain the plaintiffs cannot satisfy either the requirement that the administrative decision be adjudicatory or the requirement that the plaintiffs be without "any other adequate remedy in court." Neither of those requirements for judicial review ap-

plies to the Attorney General's determination under § 5.[20]

There is another objection to judicial review of the Attorney General's determination at the instance of the plaintiffs. It is one that the District Court in *Harper* did not note and that the Court of Appeals on appeal glossed over without any real discussion. The right to judicial review under the Administrative Procedure Act is given only to one who is "adversely affected" or who has suffered "injury in fact" by the challenged administrative ruling. § 702, 5 U.S.C.; *Conservation Council of N. C.* v. *Costanzo* (4th Cir. 1974) 505 F. 2d 498, 501; *Duba* v. *Schuetzle* (8th Cir. 1962) 303 F. 2d 570, 574-5. However the Attorney General decides under § 5, that determination cannot, as we have seen, bar the rights of the plaintiffs to vindicate their rights in the courts. They are not "adversely affected" by the Attorney General's ruling. The only party which could be "adversely affected" by the Attorney General's determination, if adverse to the enforcement of the legislation, would be the State or political subdivision whose proposed change was denied clearance; and it would be only that State or political subdivision which would have standing to invoke

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[20] *See Common Cause* v. *Mitchell* (C.A. No. 2348-71, D.D.C. March 30, 1972) where the Court dismissed an attempt to review the Attorney General's determination with this reasoning:

> "* * * 42 U.S.C. § 1973c does not require the Attorney General of the United States to make determinations that are subject to the adjudicative and judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, (1971)."

judicial review, if such were available. And that is exactly what the same District Court which decided *Harper*, it would seem, held a year after it had decided *Harper*.[21] The plaintiffs would lack standing to request a review of the Attorney General's determination, if review were permissible.

The plaintiffs, however, cite the recent case of *Dunlop* v. *Bachowski* (1975) —— U.S. ——, 44 L. Ed. 2d 377, as supporting their contention that the action of the Attorney General under § 5 was reviewable at their instance. That case, far from supporting, actually illustrates, by contrast, the non-reviewability of the Attorney General's action under § 5. In *Bachowski*, the statute grants the Secretary of Labor authority to determine whether there were sufficient irregularities in a union election to justify a suit to invalidate that election and, if he does, he "shall" file suit for that purpose.[22] But the statute specifically provides that "[t]he remedy" thus provided "for challenging an [union] election already

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[21] *Griffith* v. *United States, supra.*

See, also, United Jewish Org. of Williamsburgh v. *Wilson, supra,* at 520, n. 15, approving the result in *Griffith*:

> "Indeed, a lawsuit was instituted directly in the District of Columbia District Court by some individual assemblymen from Kings County when New York's Attorney General decided not to sue on behalf of the State to overturn the April 1, 1974, order. This suit was summarily dismissed for lack of standing. Griffith v. United States, Civil No. 74-648 (D.D.C. May 3, 1974). This clearly seems proper under Allen v. State Board of Elections, 393 U.S. at 561, 89 S. Ct. 817."

[22] 29 U.S.C. § 482.

conducted shall be exclusive." [23] In short, the action of the Secretary is absolute and final, and unless his finding supports a suit and he decides to sue, any member, who may have filed the complaint prompting the Secretary's investigation, is completely without any remedy in any court; he is absolutely at the mercy of the Secretary and his decision for the vindication of his rights with reference to the election.[24] Under those circumstances, the Court properly found a right of judicial review of the Secretary's decision. But here, the action of the Attorney General forecloses no one's rights to pursue his claim "in a court;" indeed, it cannot affect in the slightest that right. All parties have, after the Attorney General's action, the same judicial remedy they had before his action was taken and those rights cannot be barred or prejudiced by the action of the Attorney General. *Bachowski* involved a procedure entirely different from that created under § 5.

Beyond this, the express language of § 5, as well as its legislative history, provides, as we have said, not simply "persuasive" but compelling reason to believe Congress did not intend that this determination by the Attorney General should be subject to the delays that would follow from judicial review. The legislative history relating to the inclusion of this provision in § 5 demonstrates that Congress intended thereby, as the Supreme Court in *Allen* phrased it, to give "the covered State a rapid method

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[23] 29 U.S.C. § 483.

[24] *Cf., Schonfeld* v. *Wirtz* (S.D. N.Y. 1966) 258 F. Supp. 705, 708.

of rendering a new state election law enforceable" [25] without any of the delays incident to resort to the courts in any forum. The legislative purpose, as set forth in the provision, was to avoid the very judicial hearing, with its attendant delay, for which the plaintiffs argue. The legislative hearings, during which the provision was developed, confirm this conclusion. References were repeatedly made during these early hearings to the delays that resort to the courts would entail in the enforcement of changes in a State's election procedures. There was growing disquiet in the committee over the extraordinary power being accorded for intrusion by the federal government through a veto on state legislative power as the hearings proceeded. This criticism of § 5, as it appeared in the original version submitted to the Congress by the Department of Justice, apparently came to a head during an appearance of the Attorney General before the Senate Judiciary Committee. The Attorney General conceded that the delays incident to judicial clearances of state legislation on voter qualification and election standards would "take[s] a long time" and "[i]n the interval the purposes of the act are frustrated." He then suggested, as an answer to the objection and as an expeditious means of securing an administrative clearance that would obviate the delays of any judicial proceedings and would in a proper case give clearance for immediate enforcement of the State legislation, the addition to the section of a provision "giving the Attorney General discretion" to pass on

[25] 393 U.S. at 549.

[26] *See,* H.R. Rep. No. 439, 89th Cong., 1st Sess. 38 (1965).

such laws and to deny clearance "only to those laws which the Attorney General takes exception to within a given period of time." [27] This suggestion by the then Attorney General, who was the sponsor and had original responsibility for the drafting of the Act, was the genesis of that provision of § 5 which gives to the Attorney General the power to clear for immediate enforcement State legislation submitted by a State covered by § 4 of the Act. If the legislative purpose of including this provision was, as it seems plain it was, to make available a remedy that would not be subject to court delay and yet not bar the rights of any party with standing to defend or attack the State law in a proper proceeding, that pur-

[27] The statement of the Attorney General was:

"* * * The effort [underlying § 5] is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

"Now, there may be better ways of accomplishing this [than relying solely on the declaratory judgment procedure]. * * * There are * * *, a good many provisions of State law, that could be changed that would not in any way abridge or deny the [Fifteenth Amendment] right; * * * perhaps this could be improved by applying it [the declaratory judgment procedure] only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burden."

Senate Hearings at p. 237.

pose would be defeated by holding that the Attorney General's action was subject to judicial review.[28]

Judicial review of the Attorney General's determination, if intended by Congress, would, too, require the Attorney General to state more "explicit the basis" and reasoning for that determination. This is true, because, as the Court emphasized in *Dunlop*,[29] such supporting findings and reasoning are essential to judicial review. In no other manner could the court determine whether the determination of the Attorney General was based on "substantial evidence" and lacking in arbitrariness. But § 5 imposes no duty on the Attorney General to make such explicit findings and we read *Georgia* v. *United States* (1973) 411 U.S. 526, 536, as holding that the statute imposes none. In fact, the statute does not require the Attorney General either to object or

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[28] The delays that would follow, if judicial review of the Attorney General's determination were found to exist, are well illustrated by the record in *Harper*, which involved no real factual review but concerned only an issue of law. The action was begun in the District Court in August, 1972, but the District Court, though the parties submitted the case on an agreed statement of facts, did not decide it until the middle of May, 1973, almost ten months later. The appeal from that decision was not heard until September, 1974, and the opinion of the Court of Appeals was not filed until the end of July, 1975. In other words, the right of the State to enforce its legislation, if § 5 is to be construed as plaintiffs contend and as *Harper* held, would have been delayed from May 2, 1972 to end of July, 1975, a period of over three years. It was this very delay, so graphically demonstrated by the record in this case which Congress, by providing for Attorney General clearance, sought to avoid.

[29] Slip Opinion, p. 10.

not to object; he can be silent and, at the completion of sixty days from date of submission, the State or political subdivision may proceed to enforce the legislation.[30] That result is entirely inconsistent with any notion that the Attorney General must give reasons for his determination. To repeat, reviewability would frustrate the plain Congressional purpose.[31]

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[30] *See, State Board of Election Commissioners* v. *Evers* (1972) 405 U.S. 1001 at 1003-4 (Blackmun, J., concurring):

> "I am unable so to read § 5 of the Voting Rights Act of 1965, and I cannot subscribe to the District Court's reasoning. Section 5, it seems to me, plainly and clearly provides that if the proposal has been properly submitted to the Attorney General, as it was, 'and the Attorney General has not interposed an objection within sixty days after such submission,' as he did not, the proposed statutory changes 'may be enforced' without the court's proceeding in the District of Columbia and without resubmission to the Attorney General. Here the proposal was properly submitted to the Attorney General and he took no action by way of interposing an objection within the allowed 60 days. I do not see how the statute can be read or construed in any way other than to the effect that the conditions of its proviso were fulfilled and that the proposed new legislation was thereby enforceable, subject, of course, to the statute's recognized exception as to any contest on the merits."

[31] It is interesting that the plaintiffs in the thoroughly briefed case of *United Jewish Org. of Williamsburgh* v. *Wilson, supra*, at 520, n. 16, did not argue the reviewability of the Attorney General's determination:

> "Appellants do not urge that a Voting Rights Act determination of the Attorney General is reviewable under the Administrative Procedure Act, probably because they concede it to be 'committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). Analogous determinations under § 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6,

There is another troublesome matter that arises if the plaintiffs' theory is upheld. It would seem axiomatic that, if the plaintiffs have the right to judicial review of the Attorney General's determination, the State must have a like right. Just one party to a controversy cannot be given a right to review; the right must be equally available to both parties. Yet, it has been consistently assumed in all the decisions involving § 5 that, in the event the Attorney General objects to a State law, the State's sole and exclusive remedy is a declaratory judgment action in a three-judge District Court of the District of Columbia. *See Allen* at 562; *Georgia* v. *United States* at 541, n. 13; *United Jewish Org. of Williamsburgh* v. *Wilson* at 520. But under any theory of the reviewability of the Attorney General's determination, re-

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have been held not subject to judicial review. United States v. Greenwood Municipal Separate School Districts, 406 F.2d 1086 (5th Cir. 1969)."

The Court might well have added a reference to the determination by the Attorney General authorized under § 2000a-5, 42 U.S.C., Civil Rights Act of 1964. That determination is very analogous to the determination by the Attorney General under § 5. Under § 2000a-5 the requirement that the Attorney General certify that he has reasonable cause to believe that the defendant has engaged in a pattern or practice of resistance to the full and equal enjoyment of any rights secured by that statute, preliminary to the institution of an action by the Attorney General under that Act, is even more final and definitive on the rights of the adverse party than the Attorney General's determination under § 5. That determination, however, has been uniformly held to be conclusive and not subject the judicial review, since the defendant has a right to defend in court the basic issue of the existence of a pattern of resistance on his part. *United States* v. *Gray* (D.R.I. 1970) 315 F. Supp. 13, 24.

view would be before a single District Judge. This certainly would be the result if *Harper* v. *Levi* were followed, and would be contrary to the decision in *Allen*, which declares that the State's only remedy is before a three-judge court.

In sum, the determination made by the Attorney General under § 5 is not reviewable and, when he failed within sixty (60) days after submission to interpose an objection to the South Carolina Senate reapportionment as provided in Act 1205, the State of South Carolina was automatically authorized to enforce it; subject to the right of any proper party or parties to assail the constitutional validity of that legislation in an appropriate action.

The plaintiffs are accordingly not entitled to an injunction against the enforcement of the legislation by the defendants at this time and the complaint is dismissed.

And It Is So Ordered.

APPENDIX B

Opinion in *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Actions Nos. 71-1106, 71-1123, 71-1211

MAGGIE H. TWIGGS,
Plaintiff,

—versus—

JOHN C. WEST, Governor of South Carolina, O. FRANK THORNTON, Secretary of State of South Carolina, EARLE E. MORRIS, Lieutenant Governor, President of the South Carolina Senate, and LOVICK O. THOMAS, Clerk of the Senate of the South Carolina General Assembly,
Defendants.

and

DANIEL R. MCLEOD, individually and on behalf of all others similarly situated and as Attorney General of the State of South Carolina,
Plaintiff,

—versus—

JOHN C. WEST, Governor of the State of South Carolina, EARLE E. MORRIS, JR., Lieutenant Governor of the State of South Carolina and President of

the South Carolina Senate, LOVICK O. THOMAS, Clerk of the South Carolina Senate, and G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS, and ERNEST A. FINNEY, as members of and constituting the South Carolina State Election Commission,
Defendants.

GILBERT E. MCMILLAN and C. KENNETH POWELL,
Plaintiffs-Intervenors.

and

MATTHEW D. MCCOLLUM, TOBIAS GADSEN, FLOSSIE GORDON, EUGENE CAMPBELL, LEVI G. BYRD, JAMES CRAWFORD, SAMUEL BOLDEN, LEVERNE STEVENSON, QUINCY SMITH, WILLIAM MCKINLEY BOWMAN, JOHN ROY HARPER, II, W. F. GIBSON, MOSES DILLIARD, JERRY WILSON, I. DAY WATSON, MRS. VICTORIA DELEE, MRS. DOROTHY L. MATTHEWS, MRS. RACHEL H. JOHNSON,
Plaintiffs,

—versus—

JOHN C. WEST, Governor of the State of South Carolina; EARLE E. MORRIS, JR., Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate; LOVICK O. THOMAS, Clerk of the South Carolina Senate; and G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS and ERNEST A. FINNEY, JR., as members of and constituting the South Carolina State Election Commission,
Defendants.

Before HAYNSWORTH, Chief Judge, Fourth Judicial Circuit, and RUSSELL, Circuit Judge, and MARTIN, Chief District Judge, District of South Carolina.

The plaintiffs challenge the constitutional validity of an Act of the General Assembly of South Carolina enacted November, 1971. Such Act provides alternative plans for the reapportionment of the State Senate to accord with the 1970 census. The two plans are designated in the Act as Plan A and Plan B. The second plan (Plan B) is only to be followed in the event Plan A is found wanting in constitutionality. Both plans combine single and multi-county districts. The only substantial difference in the two plans is a rearrangement in the multi-county districts, with a corresponding change in the maximum variances from approximately 24% in Plan A to 19% in Plan B.

The original action, seeking a declaratory judgment of invalidity of both plans, was begun by the Attorney General of South Carolina, in his individual status as a citizen and in his official capacity, acting under a resolution of the State Senate. The plaintiff Maggie H. Twiggs instituted a similar action shortly afterwards. In both actions, the plaintiffs moved for the appointment of a three-judge court as required under Section 2281, 28 U.S.C. A three-judge court was duly constituted and the two actions, presenting identical questions, were consolidated. Gilbert E. McMillan and C. Kenneth Powell, as Chairman of the South Carolina Republican Party, have properly intervened in the consolidated action in support of

the claim of invalidity. In addition, the plaintiff Matthew D. McCollum, suing as a citizen-voter of South Carolina, has filed a separate action, in which he joins in the attack on the reapportionment act, asserting both the grounds set forth by the other plaintiffs in their complaint and the added claim of illegal discrimination under the Fifteenth Amendment. This plaintiff, also, raised the issue of the applicability of the Voting Rights Act of 1965. He concludes with a prayer for a prompt judicial reapportionment. Though this latter action has not been consolidated with the other two actions, the three actions have been litigated together, throughout.

The defendants in all three cases are John C. West, Governor of the State of South Carolina; Earle E. Morris, Jr., Lieutenant Governor of the State of South Carolina and President of the South Carolina Senate; and Lovick O. Thomas, Clerk of the South Carolina Senate.[1]

Hearings have been held, testimony taken, and various exhibits prepared and admitted into the record. All parties have moved for judgment in their favor on the basis of the record so made. Extensive briefs have been filed in support of these motions for judgment and oral arguments have been heard from all parties. We conclude that the plaintiffs are

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[1] In the Twiggs case, O. Frank Thornton, Secretary of State of South Carolina is named as a defendant.

In the McLeod and McCollum cases, G. P. Callison, Mrs. Margaret Townsend, Mrs. Martha C. Chapman, Edgar L. Morris and Ernest A. Finney, as members of and constituting the South Carolina State Election Commission, are named as defendants.

entitled to a declaratory judgment that the Act in question violates the Fourteenth Amendment and is accordingly invalid. We delay further relief in order to permit the General Assembly of South Carolina a reasonable opportunity to reapportion the State Senate.

The jurisdiction of this Court, as constituted under Sections 1331, 1343, 28 U.S.C. and Sections 1973(c), 1981, 1983, 1988, 42 U.S.C., so far as claims of invalidity under the Fourteenth and Fifteenth Amendments are concerned, is conceded. Prior to final arguments, the Attorney General of the United States had refused to approve the Act under the terms of the Voting Rights Act of 1965. The defendants stated, during argument, that they intended to contest that decision of the Attorney General in the District Court of the District of Columbia, which, by law, is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff McCollum, under the Voting Rights Act, but shall confine our consideration to the claims of invalidity under the Fourteenth and Fifteenth Amendments, which admittedly are properly before this Court.

Turning to the merits of the controversy: All the plaintiffs unite in challenging the validity of both Plan A and Plan B under the Equal Protection Clause of the Fourteenth Amendment, as applied in *Reynolds* v. *Sims* (1964) 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, reh. den. 379 U.S. 870-1. In *Sims*, the Supreme Court laid down the rule that, while "mathematical exactness" in the apportionment of legislative seats by a State was not required, the State must "make an honest and good faith effort

to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." [2] The standard of "as nearly as practicable" has been construed to mean "that the State make a good-faith effort to achieve precise mathematical equality" [3] and permits "only the limited population variances (among districts) which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." [4] The minor variances in population allowable must be based on legitimate considerations incident to the effectuation of a rational state policy [5] and be "free from any taint of arbitrariness or discrimination". [6] Rational policy requires, "logical, internally consistent rules consistently applied, not merely a rule of reason grounded on general considerations of fair representation." [7] "Even where there are theoretically valid rationales for deviating from exact population equality, those rationales must themselves be applied systematically throughout the state, not in an ad hoc

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[2] *Reynolds* v. *Sims, supra,* at p. 577. "Practicability" does not mean political practicality, for, as the Court put it in *Kirkpatrick* v. *Preisler* (1969) 394 U.S. 526, at p. 533, 89 S.Ct. 1225, 22 L.Ed.2d 519, reh. den. 395 U.S. 917: " 'The rule is one of 'practicability' rather than political 'practicality'."

[3] *Kirkpatrick* v. *Preisler, supra,* at pp. 530-1.

[4] *Kirkpatrick* v. *Preisler, supra,* at p. 531.

[5] *Reynolds* v. *Sims, supra,* at p. 579.

[6] Cf., *Roman* v. *Sincock* (1964) 377 U.S. 695, 710, 84 S.Ct. 1449, 12 L.Ed.2d 620.

[7] Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, S.Ct. Rev. 219, 242 (1969).

manner in certain places and not at all in others." [8] And the burden of justifying any variance, however small, must rest on the state.[9] In sum, the Equal Protection Clause "requires mathematical equality subject only to unavoidable deviations for acceptable reasons and then only if the deviations are within tolerable limits." *Jackman* v. *Bodine* (1970) 55 N.J. 371, 262 A. 2d 389, 395.[10]

While it is recognized that "a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering" and "to maintain the integrity of various political subdivisions",[11] a desire merely to preserve county lines in a reapportionment plan, in and by itself, is not a sufficient justification for a population deviation.[12] "Population is, of necessity, the

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[8] *Graves* v. *Barnes* (3 Judge Ct., D.C. W.D. Tex., Jan. 28, 1972) —— F. Supp. ——, stay denied, Powell, J., —— U.S. ——, (Feb. 7, 1972).

[9] *Swan* v. *Adams* (1967) 385 U.S. 440, 443-444, 87 S.Ct. 569, 17 L.Ed.2d 501.

[10] Cf., Bickel, *Politics and The Warren Court* (New York, 1965) p. 181, where the author states that the question "with apportionment, as with racial relations, is not one of rationality. It is rather, what principles restrict otherwise rational choices that a legislature might make."

[11] *Reynolds* v. *Sims, supra,* at p. 581 and 578; cf., though, *Kirkpatrick* v. *Preisler, supra,* at p. 534.

[12] *Kirkpatrick* v. *Preisler, supra,* at pp. 533-534; *Wells* v. *Rockefeller,* (1969) 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 519; *Hensley* v. *Wood* (D.C. Ky. 1971) 329 F. Supp. 787; *Wold* v. *Anderson* (3-Judge Ct. Mont. 1971) 327 F. Supp. 1342; *Howell* v. *Mahan* (3-Judge Ct. Va. 1971) 330 F. Supp. 1138.

starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies" [13] and it is only when the formulation of a plan giving equality is impracticable or unworkable that a state can rationally consider according to political subdivision some independent representation in at least one body of the state legislature. The rule, simply stated, is that the Legislature must select the best plan the constitutional thesis of one man-one vote will permit, "and the best plan is the one with the least population deviation." *Jackman* v. *Bodine, supra,* at p. 395.

Manifestly, Plan A, which has a maximum variance [14] of approximately 24 per cent does not meet the standards fixed in *Sims* and the subsequent decisions of the Supreme Court. The Legislature itself, with its Plan B, having a population variance of approximately 19%, demonstrated that it was practicable and workable to devise an apportionment plan reducing the population variances among districts below those used in Plan A. Both legislative plans maintain the integrity of county lines. Both plans are formulated along similar lines, with both single and multi-member districts. Plan B does reduce by one the number of districts and does increase in three instances the political subdivisions included in multi-member districts in Plan A. Thus, in Plan A, Laurens County is designed as a senatorial district,

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[13] *Reynolds* v. *Sims, supra,* at p. 567.

[14] Maximum variance, as used herein, defines the total difference between the two districts at the extreme deviations in the Plan. See, *Grisbaum* v. *McKerthen* [*sic*] (D.C. La. 1971) 336 F. Supp. 267, 272; and Dixon, *The Warren Court Crusade for the Holy Grail of "One-Man-One Vote"*, S.Ct. Rev. 219, 233, n. 50 (1969).

even though it is thereby over-represented 11.7% and Newberry and Union Counties are combined into a single-senator district, though the district is under-represented 3.9%. By combining in Plan B the Contiguous Counties of Laurens, Union and Newberry into a district to which two senators are allotted, the variance for the multi-district is fixed at 3.9%. Similarly, Chester and Fairfield Counties, combined in Plan A, as a single-senator district, are over-represented by almost 12%, whereas Richland County, to which 4 senators are assigned, is under-represented by 3.8%. The three counties are combined under Plan B into a 5-member district, in which there is less than a 1% variance. By small changes such as these, Plan B, observing, as we have seen, the same principles as Plan A in its construction, substantially reduces the population variances among the districts. Plan B thus establishes that the Legislature could have devised an acceptable plan, with less population variance than represented in Plan A. That fact is sufficient to render Plan A invalid. See *Kilgarlin* v. *Hill* (1967) 386 U.S. 120, 124, 87 S. Ct. 820, 17 L. Ed. 2d 771, reh. den. 386 U.S. 999.

That leaves for consideration Plan B. Again, all the plaintiffs join in asserting the constitutional infirmity in this Plan. Not only is it practicable, they assert, to achieve a more exact population equality, particularly through the use of single member districts, but, in addition, the special provisions of the plan, imposing residency qualifications and requiring use of numbered seats in multi-member districts, are constitutionally invalid. The plaintiff Matthew D. McCollum adds the claim that the Plan, taken in its entirety, is violative of his Fifteenth Amendment rights.

Though not in the same degree, Plan B, even as Plan A, is open to the argument that its population variances are excessive. The suggestion by the defendants, based on the earlier cases enunciating the one-man-one-vote rule, that maximum variations as large as those in Plan B (i.e., 19%)[15] have been approved—indeed, that such variances were approved in an earlier case involving the apportionment of the very body with which we are dealing—overlooks the fact that those deviations antedated *Kirkpatrick* v. *Preisler*,[16] *Wells* v. *Rockefeller*[17] and *Abate* v. *Mundt*,[18] in which the Supreme Court tightened and

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[15] In Plan B, the maximum variance between Districts 12 and 16 is 19%, between 14 and 15 is 18%, and between 17 and 19, is 14.5%. These six districts embrace approximately 30% of South Carolina's population. Districts 3 and 4, accounting for approximately 20% of the State's voting population, have a variance of 13.3%. Cf., *Kilgarlin* v. *Hill, supra*, at p. 125, referring to under-representation in Dallas and Bexar Counties (Texas) of 6.42% and 7.59%. Moreover, the variances were greatest in the counties of the State which the State demographer found were likely, based on past exeprience, to show the greatest growth in population during the greatest growth in population during the next decade. Whether such evidence is sufficiently authenticated to be considered is contested by the defendants (cf., *Kirkpatrick* v. *Preisler, supra*) and we do not base our conclusion on such evidence.

[16] 394 U.S. 526.

[17] 394 U.S. 542.

[18] 403 U.S. 182. *Preisler* and *Wells* concerned congressional districting but, as the commentator observed in Note, *Effective Representation and Multimember Districts*, 68 Mich. L. Rev. 1577, 1591 (1970). "Although these cases dealt with congressional districts, there is no reason to believe that the same principles are not applicable to state legislative dis-

refined its prior standards of acceptable variances.[19] Whatever may have been the earlier imprecision in the decisions, these later cases have indicated certain general limits within which legislative bodies must operate in formulating apportionment plans. Thus, in *Abate*, the Court, giving effect to a long history of maintaining the integrity of political subdivisions, approved a maximum variance of 11.9%. A local legislative body was involved and the Court recognized that "slightly greater percentage deviations may be tolerable for local government apportionment schemes" than in the case of national or state leg-

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tricts * * *." This conclusion is reinforced by the fact that in *Ely* v. *Klahr* (1971) 403 U.S. 108, 111, 91 S.Ct. 1803, 29 L.Ed.2d 352, the Court in reviewing a plan for the reapportionment of the Arizona legislature with a variance of 16%, said: "The court properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969) * * *." See, also, *Grisbaum* v. *McKeithen, supra;* cf., however, *Reynolds* v. *Sims, supra,* p. 378.

[19] See Dixon in *Apportionment in the 70s* (U. of Cal. Press 1971), p. 18:

> "Any lingering doubts about the mathematical rigidity of the Supreme Court approach were substantially undercut by the 1969 congressional districting cases. *Kirkpatrick* v. *Preisler* and *Wells* v. *Rockefeller*, and the 1970 federated college district case, *Hadley* v. *Junior College District*."

See, also, *Skolnick* v. *Illinois State Electoral Board* (3-judge Ct. Ill. 1969) 307 F. Supp. 691; *Driggers* v. *Gallion* (D.C. Ala. 1969) 308 F. Supp. 632; *Beens* v. *Erdahl* (3-judge Ct. 1972) 336 F. Supp. 715, 719; *Sims* v. *Amos* (3-judge Ct. Ala. 1972) 336 F. Supp. 924, 937.

islative bodies.[20] On the other hand, in *Wells* v. *Rockefeller*, which involved a Congressional reapportionment, the maintenance of existing county lines was held insufficient justification for a 12.1% variance. Justice White, who would have sustained the apportionment plan in *Wells*, dissented, stating, "As a rule of thumb, a variation between the largest and the smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases."[21] Considering *Preisler* and *Wells* together, it would seem that, barring some extraordinary situation, 12 per cent ordinarily represents the outer limits of permissible variance, certainly in Congressional districting. Justice White, in his dissent, would apparently extend these limits to 15%. Plan B exceeds the permissible limits of both *Abate* and *Wells* by approximately 50 per cent; it is also in excess of the outer limits of Justice White's "rule of thumb". It can only be sustained for some "quite unusual circumstances."

The record offers at best a questionable basis for a finding of "unusual circumstances". The variances cannot be justified on any theory of preserving county lines, assuming that such fact may justify deviation. A number of plans, in all of which county lines were observed, were presented and considered by the Legislature.[22] Most of these alternate

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[20] 403 U.S. at p. 185.

[21] 394 U.S. at p. 553.

[22] *Kilgarlin* v. *Hill* (1967) *supra*, at p. 124, indicates that Courts should, in reviewing a legislative plan, consider other plans that may have been before the legislature and, if such

plans considered by the Legislature had variances well below the 12% range.[23] The only reason suggested at argument for refusing to adopt one of these plans providing less population variance was that, to have done so, would have resulted in a slight reduction in election districts and a correspondingly slight increase in one or two instances of the number of counties in a multi-member district. Compactness is a factor that may be considered in preparing a state legislative apportionment plan.[24] The Legislature had, however, already recognized the feasibility of multi-county districts and had reduced the number of election districts from those prescribed in the State Constitution both under the apportionment plan under which the present State Senate is operating and under the two plans proposed in the legislation under attack. As a matter of fact, the usual manner of conforming reapportionment plans to constitutional standards as enunciated in *Sims* has been by the creation of multi-county districts with, in most cases, multi-member legislators.[25] And such groupings of contiguous counties have often been found to meet the justification of

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plans involved less population variance than the plan adopted, the Court should state "satisfactory grounds" for finding that such plans were impracticable.

[23] In this case, 4 of the 7 plans of apportionment formally introduced in the Legislature had variations less than either Plan A or Plan B. Similarly the Reapportionment Committee of the General Assembly had submitted to it 13 plans, all with smaller variances than either Plan A or Plan B.

[24] *Reynolds* v. *Sims, supra,* pp. 578-9.

[25] Bickel in *Reapportionment in the 1970s* (U. of Cal. Press 1971). p. 70.

compactness. In *Fortson* v. *Dorsey* (1965) 379 U.S. 433, 435, 85 S. Ct. 498, 13 L. Ed. 2d 401, for instance, the multi-member districts included as many as eight counties and there were alloted to some districts as many as seven senators. None of the plans considered by the Legislature in this case involved such large groupings of counties or provided for as many senators. All the plans considered did not represent excessive variations either in size of multi-county districts or in multiple senators by comparison with the two plans approved or, for that matter, with the plan of apportionment under which the Senate is now constituted. The fact that a county or two may have been added to a district or that the number of senators allocated to a district is increased cannot easily be justified as such a change in principle or in operation as to render a plan either impracticable or unworkable. It is not clear that, in determining on the practicality of a plan of reapportionment, both in connection with Plan A and Plan B, the Legislature accepted population equality as "the starting point for consideration and the controlling criterion for judgment in" this legislative apportionment controversy,[26] and we are not prepared to find that it has sustained its burden of establishing that in Plan B it has constructed the "best plan" providing the least practical population variance. For reasons hereafter stated, both Plans include as an integral part thereof an invalid provision. Because of the invalidity of this provision, the General Assembly will likely wish to review its Plans and, in connection therewith, may

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[26] *Reynolds* v. *Sims, supra,* at p. 567.

hopefully prepare a plan that accords more with the principles stated *supra* and will represent a proper adherence to the principle that population equality in electoral districts are "the controlling criterion" to be employed in the formulation of its plan.

Both Plan A and Plan B include residency provisions which are manifestly invalid. Plan A contains what the parties refer to as a "positive residence" provision. Under this provision, Florence County, with a population of 89,636 and included in a three-county district with an allocation of three senators, may have two resident senators. On the other hand, Aiken County, with a slightly greater population (i.e., 91,023), included likewise in a three-county district but with an assignment of only two senators, can have only one resident senator. Plan B has what the parties describe as a "negative residence" provision, under which, for instance, three counties—Cherokee, Clarendon and Georgetown—with a population less than the number required for the allotment of a senate seat would be guaranteed a *resident* senator. Twenty-six other counties, also without a population sufficient to permit them to have their own senator, would not have guaranteed to them a *resident* senator. Such patently capricious and arbitrary disparities between the voters and candidates in similarly situated counties are clearly violative of constitutional principles. If there is special value to the voter in having a *resident* senator, if Sims' goal of "fair and effective representation" has any relation to the residence and territorial availability of the senator—and it is argued there is such relation—then these residency clauses in both plans, discriminating as they do among the

voters and candidates in similarly situated counties must be found invalid, absent some compelling or rational justification.[27] The record, as established in this proceeding, however, is barren of any compelling—or even rational need justifying this disparity and discrimination in rights.[27a]

It is fundamental that, "the right to vote freely for the candidate of one's choice is of the essence of a democratic society"; any restrictions on that right strike at the heart of representative government.[28] Within recent weeks, the Supreme Court, reaffirming what had been previously held "in decision after decision", including *Sims*, has declared again that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."[29] Moreover, "If a citizen is entitled to vote and have his vote count, he is entitled to vote for any candidate of his choice, subject to reasonable conditions and qualifications imposed by the State."[30] "Diluting the weight

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[27] See, Dixon, *Democratic Representation* (Oxford Press, New York, 1968), p. 513, where the author finds unequal residential subdistricts for elections to state legislature invalid, and, again, in *Reapportionment in the 70s* (U. of Cal. Press, 1971), p. 28, where the same author comments that "this unequal residence device restricts political candidacy * * *."

[27a] *Dunston* v. *Scott* (3-judge Ct. N.C., 1972) 336 F. Supp. 206, 212.

[28] *Reynolds* v. *Sims, supra,* at p. 555.

[29] *Dunn* v. *Blumstein,* —— U.S. ——, 40 L.W. 4269, at p. 4271, filed March 21, 1972.

[30] *Socialist Labor Party* v. *Rhodes* (3-judge Ct., Ohio, 1968) 290 F. Supp. 983, 987 modified on other points, 393 U.S. 23.

of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race (cases cited) or economic status (cases cited)." [31] Balancing of "urban and rural power in the legislature" or of small versus large counties will not justify a discrimination in voting rights.[32] That the residence clauses do discriminate both among small counties and between the small and larger county is plain. In only three instances may any of the 29 counties not qualifying by population for a senate seat be guaranteed under Plan B *resident* senators. In all the large counties included in multi-county districts the voters are limited, in terms of residence of candidates, in their right to exercise of their sufferage "to vote for any candidate of his (their) choice." The effort thus to favor the smaller county by this discriminatory limitation on the right of suffrage through the use of residency provisions is an unreasonable restriction at variance with the command of equal protection set forth in the Fourteenth Amendment that infects both Plans A and B.

Neither *Fortson* v. *Dorsey*, *supra*, nor *Dusch* v. *Davis*, *supra*, though cited by the State in support of these residency provisions, can sustain the discrimination arising out of the application of these residency requirements. In Fortson, certain districts had multiple members. These districts were, however, divided into subdivisions and the apportionment

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[31] *Sims*, 377 U.S. at p. 566.

[32] *Davis* v. *Mann* (1964) 377 U.S. 678, 692; *Driggers* v. *Gallion*, *supra*, at p. 634.

plan provided that there should be a *resident* senator from each of these subdivisions. The subdivisions all had a population which substantially qualified them to elect a senator, though such senator, under the reapportionment plan, had to be elected by all the voters of the district. As this Court observed in an earlier case involving this same contention, this case "seems comparable to this, except for the crucial fact that the subdivisions of the voting unit there (to which there was allotted a resident senator) were apprximately [*sic*] equal in population." [33] *Dusch* is even more inapposite. It dealt with a local governmental unit. It is well settled that the strict principles of *Preisler* and *Wells*, with which state legislative apportionment plans such as that involved here must comply, "need not be applied to smaller specialized districts * * *",[34] and *Dusch* simply recognizes and upholds "the States' need for flexibility in structuring local units", a need which "became (becomes) greater as we proceed down the spectrum from the state legislature to the single-purpose local entity".[35] The rationale of *Dusch* thus lies in "the

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[33] *O'Shields* v. *McNair* (3-Judge Ct. S.C. 1966) 254 F. Supp. 708, 714.

See, also, *Keller* v. *Gilliam* (5th Cir. 1972) 454 F.2d 55, 56, where the Court emphasized that in *Fortson*, there was no attack "on the equality of the population of the different districts" and that actually they were all "*equally* populated districts * * *." (Court's italics).

[34] *Hadley* v. *Junior College District* (1970) 397 U.S. 50, 70, 90 S.Ct. 791, 25 L.Ed. 45 (Burger, C.J. dissenting).

[35] *Hadley* v. *Junior College District*, *supra*, at pp. 61 and 67 (Harlan, J., dissenting).

desirability of leaving open broad areas of experimentation in representation forms *at the local level.*" (Italics added.)[36] As it was explained in *Avery* v. *Midland County* (1968) 390 U.S. 474, 485, *Dusch* upholds in the legislature a power "of innovation, experiment, and development among *units of local government*" (Italics added) and was simply applying "constitutional principle to the complexities of local government but not to state government".[37]

Having concluded that neither legislative plan is valid, this Court, the plaintiff, McCollum, urges, should forthwith enunciate a plan of its own, based on single districts constructed to achieve population equality without regard to county boundary lines. We are, however, disposed to allow the Legislature another opportunity to develop an acceptable plan. When practical, this seems the preferable course,

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[36] *Martin, The Supreme Court and Local Reapportionment: The Third Phase* (1970) 39 Geo. Wash. L. Rev., p. 102.

One commentator, reviewing *Dusch* and *Sailors* v. *Kent Board of Education* (1967) 387 U.S. 105, has remarked:

> "The Court's reluctance to demand the rigid arithmetic equality required of state legislative and congressional districting plans seemed to reflect an awareness of the unique and varied problems facing local governmental units: 'Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation.' " quoting from *Sailors*.

O'Rourke, *Reapportionment* (Domestic Affairs Study, Washington, 1972) p. 15.

[37] *Avery* v. *Midland County, supra,* at p. 496 (Fortas, J., dissenting. See, also, *Abate* v. *Mundt, supra,* at p. 185.

since as the Court stated in *Sims* and reiterated in *Burns* v. *Richardson* (1966) 384 U.S. 73, 85, 86 S. Ct. 1286, 16 L. Ed. 2d 376, " 'legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.' "[38] The Legislature is in session; the general election itself is approximately seven months away. There is unquestionably ample time within this period for the General Assembly to formulate a new plan, based perhaps on another grouping of counties, which, while respecting county lines, will achieve an acceptable population variance, provided it will act promptly "in a timely fashion" without unnecessary delay. The General Assembly is accordingly given thirty (30) days from the date of this Order to enact a new plan. We have adopted this schedule because any greater delay might jeopardize the regular election to be held in November of this year. If the Legislature fails within that time to enact a plan, the Court will be forced to promulgate a plan of its own. The adoption of this procedure will, however, give the General Assembly every reasonable opportunity to meet its own responsibility, a responsibility that is generally to be respected, and, only by its default and failure to construct a valid plan of its own, will the Court act.

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[38] See, also, *Davis* v. *Mann, supra,* at p. 693; *Silver* v. *Jordan* (3-Judge Ct., Cal. 1964) 241 F. Supp. 576, 586, aff. 381 U.S. 415; *Moody* v. *Gallion* (D.C. Ala. 1968) 286 F. Supp. 653, 656.

We do not agree, however, that any plan that may be formulated by the General Assembly must provide for single-member districts and cannot include multi-member districts. Were this required, it is manifest neither the General Assembly nor the Court would likely be able to work out a proper plan of reapportionment for use at the election in November. We do not, however, find such drastic action required. The authorities do not interdict multi-member districts.[39] So much was held in both *Fortson* v. *Dorsey*, *supra*, and *Burns* v. *Richardson*, *supra*. It was reaffirmed and emphasized anew in *Whitcomb* v. *Chavis* (1971) 403 U.S. 124, 147, where in sustaining multi-member districts, the Court said that, "We are not ready, however, to agree that multi-member districts, wherever they exist, overpresent their voters as compared with voters in single-member districts, even if the multi-member delegation tends to bloc voting." It is only when the provision for multi-member districts incorporates some additional provision that unconstitutionally "operate(s) to minimize or cancel out the voting strength of racial or political elements * * *"[40] that it becomes illegal. Such dilution is not to be presumed; it must appear on the face of the legislation itself or from evidence in the record.[41] The Supreme

[39] In both *Kilgarlin* v. *Hill*, *supra*, and *Davis* v. *Mann*, *supra*, the apportionment plans included a combination of single and multi-member districts and this aspect of the plan was not disapproved. See, also, *Gunderson* v. *Adams* (3-judge Ct. Fla. 1970) 328 F. Supp. 584, 585, and *Wold* v. *Anderson* (3-judge Ct. Mont. 1971) 327 F. Supp. 1342, 1345.

[40] *Burns* v. *Richardson*, *supra*, at p. 88. The same rule is expressed by the Court in *Fortson* v. *Dorsey*, *supra*, at p. 439.

[41] 403 U.S. 144.

Court found no such effect in the Indiana multi-member plan reviewed in *Chavis*; indeed, as the Court remarked in *Chavis*, it has never sustained an attack on a multi-member plan.[42] If the General Assembly in this case adopts a plan with acceptable population variances and without any special provisions diluting "the voting strength of racial or political elements" the plan is not to be invalidated merely because it contains both single member and multi-member districts. The plaintiff McCollum suggests, though, that, because of a record of past racial discrimination, *Chavis*, with its approval of multi-member districts, is not applicable to a legislative reapportionment effected by a Southern Legislature. However, there is not the slightest evidence that in its reapportionments, South Carolina has ever been motived by racial considerations. In fact, we understood that counsel for McCollum conceded the want of racial motivation in the reapportionment plans reviewed in this action. Under these circumstances, there is no basis for regarding the situation in South Carolina differently from that in Indiana, which was at issue in *Chavis*. It is not to be lightly assumed that the Supreme Court intends to establish "different apportionment rules for the North and the South", and yet that is what the argument of plaintiff McCollum leads to. See, 85 Har. L. Rev. 146 (1971).

Neither do we find the provisions for a "numbered place system of conducting primary and general elections, included in both plans, illegal. Under this system, each senate seat constitutes a separate

[42] 403 U.S. 144.

and distinct office, and candidates, in qualifying, must file for one specific senate seat in any district where more than one senator is to be nominated. It is contended by the plaintiffs that this "numbered seat law" illegally dilutes minority voting power. If a plan does not incorporate the invalid residency provision, or some similar invalid restriction, it does not appear that the "numbered seat" requirement is either arbitrary or unreasonable, especially if applied fairly and indiscriminately to all senatorial seats. It was the failure to apply it uniformly throughout the State that prompted the Court in *Dunston* v. *Scott, supra,*[43] to question the validity of such a law.

As we have already indicated, the Court is confident that, observing the guidelines laid out by the applicable authorities, the General Assembly will attempt in good faith to construct a new plan, not burdened with any unacceptable restrictive provisions, that will accord with the principle of "one-man-one-vote" as stated in *Sims* and subsequent related cases. Should the General Assembly not act, however, this Court will, as we have previously indicated, proceed to reapportion the State Senate.

Judgment will accordingly be entered that Act #961 of the General Assembly of South Carolina, approved November 11, 1971, is invalid. Jurisdiction is retained to render other and further relief if the General Assembly shall fail, within thirty (30) days from the date hereof, to enact an acceptable plan for the apportionment of the Senate of the State of South Carolina.

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[43] 336 F. Supp. at p. 213.

AND IT IS SO ORDERED.

Dated: April 7, 1972.

/s/ Clement F. Haynsworth, Jr.
Chief Judge
Fourth Judicial Circuit

/s/ Donald Russell
United States Circuit Judge

/s/ J. Robert Martin, Jr.
Chief United States District Judge
District of South Carolina

APPENDIX C

Order Denying Motion To Alter or Amend Judgment

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CA/75-1998

FRANCIS MORRIS AND MAXINE WOODS,
Plaintiffs,

—versus—

L. MARION GRESSETTE, President Pro Tem of South Carolina, et al.,
Defendants.

ORDER

After due consideration of the plaintiffs' motions to Supplement Record, to Alter or Amend Judgment and for Injunction Pending Consideration of Rule 59 Motion and Pending Appeal, and of the memorandum submitted in support thereof,

IT IS ORDERED, That the motions be and they are hereby denied.

For the Court:

/s/ Donald Russell
United States Circuit Judge

[Filed Mar. 30, 1976]

APPENDIX D

Notice of Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 75-1998

FRANCIS MORRIS AND MAXINE WOODS,
Plaintiffs,

—vs—

L. MARION GRESSETTE, President Pro Tem of South Carolina, et al.,
Defendants.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. § 1253, plaintiffs appeal to the Supreme Court of the United States from the judgment entered March 12, 1976, dismissing the complaint, and the order, entered March 30, 1976, denying plaintiffs' motion to alter or amend the judgment.

/s/ Armand Derfner
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(803) 577-3170
Attorney for Plaintiffs

Charleston, South Carolina
April 16, 1976

APPENDIX E

Section 2 of South Carolina Act 1205 of 1972, S.C. Code § 30-4.4

SECTION 2. Effective with the 1972 elections, the State of South Carolina is hereby divided into the following Senatorial Districts:

PLAN A

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
1	Abbeville Anderson Oconee Pickens	4	226,270	+0.45
2	Greenville Laurens	5	290,259	+3.08
3	Greenwood McCormick	1	57,641	+2.35
4	Spartanburg	3	173,724	+2.83
5	Cherokee Newberry Saluda Union	2	109,822	—2.49
6	York Lancaster Kershaw	3	163,271	—3.36
7	Chester Fairfield Richland	5	283,678	+0.75
8	Edgefield Aiken Barnwell Barnberg Lexington	4	228,853	+1.59

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
9	Lee Chesterfield Marlboro Dillon	2	107,979	—4.13
10	Darlington	1	53,442	—5.10
11	Florence Marion Horry Williamsburg	4	224,141	—0.50
12	Sumter Clarendon	2	105,029	—6.75
13	Calhoun Orangeburg Dorchester	2	112,845	+0.19
14	Berkeley	1	56,199	—0.21
15	Allendale Hampton Jasper Beaufort Colleton	2	116,213	+3.18
16	Charleston Georgetown	5	281,150	—0.15

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

In the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate of South Carolina shall be apportioned as follows:

PLAN B

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
1	Abbeville Anderson Oconee	3	167,314	—1
1A	Pickens	1	58,959	+4.68

Provided, that if the Court determines that the division of District 1 into Districts 1 and 1A constitutes an unacceptable variance, they shall be joined and designated as District 1 with four Senators assigned thereto.

2	Greenville Laurens	5	290,259	3.08
3	Spartanburg	3	173,724	2.83
4	Greenwood McCormick	1	57,641	2.35
5	Cherokee Chester Fairfield Lancaster York	4	215,145	—4.49

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
6	Newberry Union	1	58,503	3.88
7	Richland	4	233,868	3.82
8	Calhoun Lexington Saluda	2	114,320	1.50
9	Aiken Edgefield	2	106,715	—5.25
10	Allendale Bamberg Barnwell Orangeburg	2	112,607	—0.02
11	Beaufort Colleton Hampton Jasper	2	106,521	—5.42
12	Charleston Dorchester	5	279,926	—0.59
13	Lee Chesterfield	1	51,990	—7.68
13A	Marboro Dillon	1	55,989	—0.58

Provided, that if the Court determines that the division of District 13 into Districts 13 and 13A constitutes an inacceptable variance, they shall be joined and designated as District 13 with two senators assigned thereto.

14	Kershaw Sumter	2	114,152	1.35
15	Clarendon Florence	2	115,240	2.32

		Number Senators	*1970 Population*	*Per Cent Variance From Average*
16	Georgetown Horry Marion Williamsburg	3	168,005	—0.56
17	Berkeley	1	56,199	—0.21
18	Darlington	1	53,442	—5.10

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.*

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* A majority runoff requirement, applicable to primary elections for the state Senate and other state offices, is imposed by S.C. Code § 23-496.

APPENDIX F

Section 5 of the Voting Rights Act of 1965, as Amended, 42 U.S.C. § 1973c

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on

account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.